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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No._____

ASHTON BRYAN JONES,

Petitioner

v.

STATE OF GEORGIA,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent prays that the petition for writ of certiorari be denied, giving reasons herein for this position.

CITATION TO OPINION BELOW

In addition to the citation of 136 S.E. 2d 358, given in the petition, the opinion of the Supreme Court of Georgia is reported at 219 Ga. 848.

JURISDICTION

The jurisdiction of this Court is conceded, but we point out that the petitioner is here asserting a "depri-

vation of right," to wit: Deprivation of advocacy and of freedom of speech, which was not asserted in the Georgia courts.

QUESTIONS PRESENTED

1. By his demurrer to the indictment (R. 8-9), petitioner asserted that the Georgia statute, Code sec. 26-6901 (Interfering with religious worship) violated "the due process clause . . . of section 1, Fourteenth Amendment, Constitution of the United States" in that it "is upon its face so *vague,* indefinite and ambiguous that said statute wholly fails to give the defendant adequate *notice* of the acts and conduct which constitute a violation of said statute." This was again asserted in his Motion in arrest of judgment, filed subsequent to the trial. (R. 38) Neither of these pleadings asserted any claim that his right of freedom of speech or his right of advocacy was prohibited or curtailed by said Statute. It seems, therefore, that the first of the "Questions" set forth by Petitioner under "Questions Presented" is not properly involved, since the petitioner now seeks to have this Court decide whether said Statute "effectively prohibits advocacy of church desegregation." The Supreme Court of Georgia has not considered or decided whether the Georgia statute in question "effectively prohibits advocacy of church desegregation," but considered the challenge to the statute upon the ground that it was "so vague, indefinite and ambiguous that it fails to give the defendant notice of the act and conduct which constitutes a violation." (219 Ga. 848, on page 850.)

2. As to Question No. 2, we believe that the petition states it more broadly than it should be stated. The

question should be: whether petitioner's Fourteenth Amendment right to due process of law was violated by the trial judge overruling petitioner's motion to disqualify him in this specific case.

STATEMENT

To the "statement" in the petition for certiorari, we believe the following items of evidence should be added:

Events of Sunday Morning

(a) Rev. J. A. Langley (R. 187 et seq.) testified that he was an associate minister of the First Baptist Church in Atlanta, and was attending divine worship there on the last Sunday in June, 1963; that he and other worshippers underwent a disturbance during the morning service; that he and other worshippers were standing in the vestibule, with bowed heads, while the morning prayer was being offered, when he "heard some screams and shouts right outside the front door"; that the volume of that sound was heard very intensely in the vestibule where they were standing bowed in prayer, and even in the sanctuary where people were sitting (R. 188); that he then "went to try to find out what the source of it was" and went "to the front of the church" where he "saw Mr. Jones (the defendant) sitting at that time on the front steps (R. 189); that two people were sitting there with him; that while he and the others were in the vestibule they were hearing the prayer, by the pastor, Dr. McClain, over the loud-speaker system; that the screaming and hollering decidedly disturbed him and others who were there. (R. 190)

(b) H. E. Watts, in addition to the parts of his testi-

mony stated in the petition, testified: (R. 222 et seq.) that on that Sunday morning he was chairman of the hospitality committee; that he first saw the defendant standing on the stairs at the entrance to the foyer in front of the church, yelling in a very coarse, raucus voice to all the people as they came into the sanctuary, "come right in, folks, worship a segregated God in a segregated church." (R. 223) Mr. Watts asked him to stop but he continued for some time in that same coarse voice, the same statement to all members as they came in; finally Mr. Watts closed that door at the side entrance of the front foyer; Mr. Jones then went around to the front, the main entrance from Peachtree, and continued the same thing (R. 224); he continued for a while and then he sat down on the steps and discontinued that yelling; he then sat up, and one of the ushers just touched him on the elbow and Mr. Jones immediately dropped right down on the steps and sprawled out there and yelled, help, help; he stayed there for some time just laying there on the steps yelling; nobody was within 20 feet of him at that time. (R. 224) Mr. Watts then went inside the foyer, and the church service had begun, and while standing there in the foyer he heard this yelling again outside; Mr. Watts went outside again and "the same man was lying on the walkway" and yelling "help, help, police" which he continued for several minutes; this was on the church walkway, the church entrance, "not on the public sidewalk"; no one was within at least 20 feet of him at that time. (R. 225)

(c) Glenn Bailey testified that on the Sunday morning in question he was "in the main sanctuary" of the First Baptist Church, in his customary place, and he heard a man's voice hollering outside the church (R. 256); that

oftentimes things are heard within the church such as fire engines or an ambulance going by, but this particular noise was a little more disturbing.

(d) Fred W. Echols testified (R. 430 et seq.) that he was a member of the Hospitality Committee and was at the First Baptist Church that Sunday morning and saw Reverend Jones on the "flat area" between the sidewalk and the steps leading up to the main sanctuary, hollering "help, police" and "there was absolutely nobody around him at all and he was doing all this hollering." (R. 434-435)

(e) Lieut. W. K. Perry, of the City Police, testified (R. 437) that he drove or came to the vicinity of the First Baptist Church several times, on the Sunday morning in question; the first time he saw the defendant sitting on the steps in front of the church; the second time he was on the sidewalk in front of the church . . . standing . . . hollering pretty loud . . . he was shouting; the officer was in his car 60 or 70 feet back in the next block and could not understand the words he was shouting; no one was around the defendant; he did not see anyone put their hands on him or scuffle with him (R. 440); when the officer heard him hollering the officer started walking to the intersection, which was toward the First Baptist Church, "and he stopped his hollering" (R. 440); then the officer went back to his automobile.

Events of Sunday Evening

(f) Glenn Bailey testified as to the part that he saw on Sunday evening; that he first saw the defendant with three companions about 6:15 p.m., kneeling or the walkway outside the chapel entrance, in a position of

prayer (R. 263-264); that one of them went down the walk to the chapel entrance and examined the door, then came back to his companions (R. 265); then the group got up and went down the walk to the chapel entrance, then they all ran up the steps and through the chapel doors (R. 266); when they got inside the vestibule they sat down on the floor (R. 266); one of them stood up and leaned against one of the doors, reading aloud, while Jones "was sitting there saying nothing." (R. 270)

(g) Rev. J. A. Langley testified to events happening that Sunday evening, and to the defendant "blocking the passageway" at the side entrance to the church from Fifth Street (R. 191); he testified that a worship service was due to begin at 6:45 p.m., and he (Mr. Langley) arrived there between 6:30 and 6:45 and the defendant was "sitting in an entranceway leading into the church"; that this was an entranceway that people used for the evening service; that he spoke to the defendant and he got up; that he was trying to get the defendant not to continue the activity he was engaged in, but the defendant was adamant, impervious to the appeal that Rev. Langley made, and the defendant "sat back down, blocking the passageway." (R. 191)

(h) Fred W. Echols testified to events of the evening; that he saw the defendant sitting on the steps to the entrance of the chapel "from 6:30 on" (R. 431); that "there were a lot of people around"; that there were several people from the church I knew and there were several people from the church across the street" (R. 432). He described the arrival of two police officers, "and they talked to him for several minutes (R. 431);

then they helped him up or he got up, then he went limp; then the police officers took him by the arms, "under the arm-pits," with the defendant "kicking and hollering" and took him from the church entrance to the police car. (R. 431-433) There was "much commotion." (R. 432)

REASONS FOR NOT GRANTING THE WRIT

I.

Petitioner seeks to have the Supreme Court consider this statute as one curtailing his constitutional right of freedom of speech. But the case does not involve such question. First, the pleadings did not raise that issue. Second, the evidence in the case shows that the statute was not applied so as to deprive the defendant of his right to freedom of speech.

First, as to the pleadings, the demurrer alleged that the Georgia statute in question violated the due process clause of the Fourteenth Amendment in that "it is upon its face so *vague,* indefinite and ambiguous that said statute wholly fails to give the defendant adequate notice of the acts and conduct which constitute a violation of said statute." (R. 8-9) This was again asserted in his Motion in Arrest of Judgment. (R. 38) Neither of these pleadings asserted any claim that his right of freedom of speech or his right of advocacy was prohibited or curtailed by the statute. Also, the Supreme Court of Georgia in its decision (219 Ga. 848, 136 S.E. 2d 358) did not decide such question of violation of right of freedom of speech, but only the constitutional question presented by the pleadings, as to alleged vagueness of the statute.

Second, the evidence does not make a case of the

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statute being applied so as to prohibit or curtail defendant's right to freedom of speech. He went far beyond oral advocacy of his ideas. By his yelling and shouting, just outside the door of the church, while the service was in progress and prayer was taking place, he disturbed the divine worship on that Sunday morning. Then he went back to the same church that evening and carried his "disturbing" one step further, and sat down in the entranceway, blocking its passage. We have set forth in our *statement,* ante, much of this evidence, to show that he went far beyond the bounds of permissible advocacy.

The petition for writ of certiorari says, on page 11, that "It is clear that petitioner's purpose was to advocate ideas; namely, the evils of segregation and the immorality of Christians who exclude Negroes from worship." It seems equally clear that he determined to go beyond the advocacy of his ideas, and *disturb* the divine service which was in progress. If his purpose had been only to advocate and express his ideas peacefully, he need not have gone back the second time that Sunday evening. He had expressed himself on Sunday morning, rather forcefully, both in the vestibule and on the church steps and walkway, and he had not been arrested. The scene was evidently too mild, from his viewpoint. He therefore went back that evening, determined to get inside one of the doorways of the church and sit down on the floor and cause a "scene," hoping thereby to disturb and jolt the congregation more. And when some officers came and took him away, that Sunday evening, his falling limp and kicking and yelling, created a greater disturbance and apparently accomplished his purpose of going to the extreme of bringing about his arrest. This was not mere

"advocacy." And the statute has not been applied to curtail a citizens right of freedom of speech.

The Supreme Court has stated that it does not formulate a rule of constitutional law broader than is required by the precise facts presented by the record. *Garner* v. *Louisiana,* 368 U. S. 157, 82 S. Ct. 248 (1).

In *Bush* v. *Texas,* 372 U. S. 586, 590, 83 S. Ct. 922 (2), the Supreme Court said ". . . as a rule of consistent application, this Court has declined to anticipate a question of constitutional law in advance of the necessity of deciding it."

In *U. S.* v. *Spector,* 343 U. S. 169, 172, 72 S. Ct. 591 (6), the Supreme Court said: "When a single, naked question of constitutionality is presented, we do not search for new and different constitutional questions. Rather, we refrain from passing on the constitutionality of a phase of a statute until a stage has been reached where the decision of the precise constitutional issue is necessary."

Gist of this Offense was Disturbing Divine Worship

On pages 12 and 13, the petition seeks to have the Supreme Court consider "different factual contexts." It is stated that if the petitioner had limited his protest to a peaceful demonstration outside the church, his activity would be constitutionally protected. We do not dispute this. He contends, however, that such a peaceful demonstration outside the church would be covered by the Georgia statute in question. This we do dispute. Certainly no such question is presented here. He was not prosecuted or arrested for a peaceful demonstration outside the church, and there is no reason to believe that

such a result would have taken place. In fact, the evidence shows the contrary. No arrest was made, or even threatened, for his "advocacy." The gist of the offense for which he was eventually prosecuted was the *disturbing* of divine worship, which he did by his shouting and by his sitting on the floor under the circumstances proven.

In *United States* v. *Raines*, 362 U. S. 17, 22, 80 S. Ct. 519 (4), the Court said: "The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases."

The case which the petition cites in support of his effort to get the court to consider "other factual contexts" is *NAACP* v. *Button*, 371 U. S. 415, 432. But that was a case begun by a petition for declaratory judgment and injunction, covering the whole scope of a Virginia statute. In such a case, the Supreme Court considered all angles of the application of the statute in question, not just a case involving a trial and conviction on specific evidence.

In *Winters* v. *New York*, 333 U. S. 507, 509, 68 S. Ct. 665, cited on page 11 of the petition, the Supreme Court held a New York obscene literature statute violative of the Fourteenth Amendment as denying the right of freedom of speech. But it is pointed out on Page 509 of the decision that the validity of the statute on this very point was drawn in question in the State Court.

In *Edwards* v. *South Carolina*, 372 U. S. 229, 83 S. Ct. 680, which is relied upon and cited three times in the petition, the decision comments on the fact that the defendants were walking peacefully on the public sidewalk around the state house, demonstrating, "they were

convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection." The statute under which they were convicted, and affirmed by the State court, was therefore held unconstitutional by the Supreme Court, saying, "The Fourteenth Amendment does not permit a state to make criminal the peaceful expression of unpopular views." (Page 237) A much different case is here presented, with the defendant's conduct being far from peaceful and on the property of the Church, and the gist of the Statute in question being the disturbing of divine worship.

In *Herndon* v. *Lowry,* 301 U. S. 242, cited three times in the petition, the Supreme Court was considering the validity of the Georgia inciting to insurrection statute against the allegation that said statute was unconstitutional as denying freedom of speech. The Supreme Court did not invalidate the statute from future use but held (P. 259) that "as applied to him (Herndon) the statute unreasonably limits freedom of speech and freedom of assembly" and (P. 261) that "the statute, as construed and applied in the appellant's trial, does not furnish a sufficiently ascertainable standard of guilt." In the present instance we believe that the test should be applied in the same way, to the evidence in the trial, and to the statute *as applied* to the evidence in the case.

The petition, on page 11, refers to the phrase contained in the statute: "otherwise indecently acting." This phrase was stricken out of the indictment, on complaint of the defendant in his demurrer to the indictment, he

demurring to that particular language of the indictment for alleged "vagueness." (R. 12) The trial judge sustained this contention and struck that clause, leaving the balance of the indictment to stand, with its specific allegations. (R. 13)

The petition, on page 11, also refers to there being in this case "a contested factual dispute." In such a case, involving contested facts, the Supreme Court does not decide the credibility of the different persons, but will weigh the evidence from the standpoint of whether there was *any* evidence to authorize the conviction without doing violence to the constitutional provisions invoked. So, in *Edwards* v. *South Carolina,* supra, the Supreme Court held that there was *no evidence* showing that the accused did any more than peaceably express their opinions in marching upon the public sidewalk around the state house. (P. 237.)

Similarly, in *Wright* v. *Georgia,* 373 U. S. 284, 83 S. Ct. 1240, where the accused (playing basketball in a public park) were convicted under a breach of the peace statute, the decision says: "The record is devoid of any activity which a breach of the peace statute might be thought to punish." The petitioner in the case now at bar cannot say that the present record is devoid of any evidence that he disturbed divine worship by his acts and conduct at the First Baptist Church. Neither can he say that what the State proved he did was only indulging in constitutionally protected conduct.

Before leaving this division of our Response, we wish to point out that Disturbing Religious Worship has been recognized as an offense since the time of the common-law; that many cases of prosecutions for this offense are

referred to in the text and annotations in *18 Corpus Juris 1388* et seq., and *27 C. J. Secundum 819* et seq., and that the following case appears cited on page 1389 of *18 Corpus Juris,* with the following quotation from that early case: *U. S.* v. *Brooks,* 24 F. Cas. No. 14,655, 1 Cranch C.C. 427:

> "The principles upon which the disturbance of public worship becomes an offense at common law are these: Every man has a perfect right to worship God in the manner most conformable to the dictates of his conscience and to assemble and unite with others in the same act of worship, so that he does not interfere with the equal rights of others. . . . And whenever the injury is common to an indefinite number of persons, so that no one has a greater right to sue than another, the private injury is merged in the public wrong, and becomes the subject of public prosecution. . . ."

This inalienable right became one of the cornerstones upon which this nation was founded, and its protection has been recognized as just as important to the public welfare as the protection of the right of freedom of speech. No one, therefore, can justly claim "freedom of speech" as an answer to the acts and conduct proven against the accused in this case.

II.

Petitioner's Fourteenth Amendment right to due process of law was not violated by the trial judge overruling petitioner's motion to disqualify him in this case.

The Motion to disqualify (R. 5 to 7) did not set forth any sufficient facts showing that Judge Pye was disqualified to try the case. In the introductory para-

graph it is claimed that the judge has made repeated denunciations of the Negro race in general and this defendant in particular. This would indicate that it was drawn for use in the trial of a Negro. This defendant was not a member of the Negro race.

In the next paragraph, numbered 2, the Motion lists eight items as showing that the judge had a prejudicial interest against the defendant. None of these items show any unconstitutional or disqualifying bias against this defendant.

Under the title "Judges" in *30-A Am. Jur.*, pages 88-89, the text says:

> "Bias or prejudice does not refer to any views a judge may entertain toward the subject matter involved in the case. Hence, a judge is not disqualified from presiding at a criminal trial by the fact that he looks with abhorrence on the commission of crimes, or because he belongs to an organization for the suppression of crime, or participated in movements to enforce the law on particular subjects."

In *Ryan* v. *United States*, 99 F. 2d 864 (10), (8 C.C. 1938), the court held "that a judge, to be disqualified, must have a personal bias or prejudice against the party or in favor of an opposite party," and that "judicial rulings cannot ordinarily be made the basis of a charge of bias or prejudice." In that case certiorari was denied, 306 U. S. 635, and rehearing denied, 306 U. S. 668. The *Ryan* decision, on page 871, distinguishes *Berger* v. *United States*, 255 U. S. 22 (which is cited in the present petition), and points out that the disqualifying biased statements of Judge Landis in the *Berger* case "were made against a class of which the defendant was a member."

The disqualification referred to in the Federal court cases would be based, of course, upon the Federal statute. But in a case like the present, where the alleged disqualification of a State court judge is under consideration by the United States Supreme Court it would have to be such as to deny due process of law to the accused. This distinction was recognized in *Re Murchison,* 349 U. S. 133 (cited in the present petition), in which the Supreme Court held, by 6 to 3, that the Michigan judge who had sat as a one-man grand-jury, out of which contempt charges arose, was disqualified from trying a contempt case against a witness who had testified to him in such grand-jury.

More recently, in *Ungar* v. *Sarafite, Judge,* 376 U. S. 584, 84 S. Ct. 841, 847, the Court had another such question up from a New York court and held, 6 to 3, that the New York judge who had tried a certain criminal case was not disqualified from hearing contempt charges against a witness, or at least that the witness was not deprived of his constitutional right to a fair trial and due process of law. The majority opinion discussed the *Murchison* case, supra, and distinguished it.

In *Eisler* v. *United States,* 170 F. 2d 273 (Ct. App. D.C. 1948), it was held (Page 278) that "Prejudice, to require recusation, must be personal according to the terms of the statute, and impersonal prejudice resulting from a judge's background or experience is not . . . within the purview of the statute." And the decision pointed out that the affidavit to disqualify "must state facts and reasons which tend to show personal bias and prejudice . . ." (citing *Berger,* supra, on this point). This strongly supports our position that although the

motion to disqualify in the present case alleged that the judge was prejudiced against the defendant, the eight recitals of Judge Pye's alleged actions and statements did not show any personal bias or prejudice against this defendant. In the *Eisler* case the certiorari was dismissed, 338 U. S. 883.

The defendant was not a member of the race which the petition alleged Judge Pye was prejudiced against; he was not even indicted and charged with a violation of the Act of 1960 (Ga. Laws 1960, page 142), (known as the anti-trespass law), which was referred to repeatedly in items "g" and "h" of the Motion to Disqualify, but he was charged with an entirely different offense, disturbing divine worship. The Motion to Disqualify, in par. "d," said that ordinarily the Grand Jury would be empaneled and charged by the presiding judge. Judge Pye *was* the presiding judge at that time.

The Motion to Disqualify said that Judge Pye had called for a list to be furnished by the Chief of Police showing "the names of this and other defendants who had been charged with misdemeanor offenses relating to peaceful protest against discriminatory practices, policies, customs and acts by private persons, public officials and others as relates to the rights and privileges and immunities of Negro citizens of the City of Atlanta, Fulton County, Georgia." This indictment against defendant did not relate to any right or privilege or immunity of Negro citizens. No one has claimed, yet, that Negro citizens have any legal "right" to join or participate in worship in white churches. Not even this defendant claimed that. His counsel claim that the defendant was advocating "the evils of segregation and the immorality,

of Christians who exclude Negroes from worship," but that presents a moral question, not a legal question. So, the letter of Judge Pye to the Chief of Police, referred to in item "a" of the Motion to Disqualify, did not include any reference to the charge upon which this defendant was indicted. This defendant was not included in any of the references or items of conduct or acts alleged against Judge Pye. The Motion was insufficient on its face, and required no hearing.

In *Foster* v. *Medina*, 170 F. 2d 632 (2 C.C. 1948), it was held that the affidavit of personal bias and prejudice filed against Judge Medina presiding in the trial was insufficient, in that "In none of the three excerpts from the colloquy do the quoted remarks of Judge Medina 'give fair support to the charge' of prejudice." (Cert. denied, 335 U. S. 909.)

CONCLUSION

For all the foregoing reasons, Respondent urges this Court to decline to issue the writ of certiorari in this case.

Respectfully submitted,

WILLIAM T. BOYD,
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CERTIFICATE OF SERVICE

GEORGIA, FULTON COUNTY

I, J. Walter LeCraw, of counsel for the State of Georgia, respondent in the foregoing case, certify that I have this day served copies of the foregoing Brief of Respondent in Opposition to petition for writ of certiorari upon Petitioner, by depositing in the United States Post Office in Atlanta, Georgia, two copies of same in an envelope addressed to Jack Greenberg, Attorney, 10 Columbus Circle, New York, New York, 10019, and two copies of same in an envelope addressed to Donald L. Hollowell and Howard Moore, Jr., Attorneys, 859½ Hunter Street, N.W., Atlanta, Georgia, 30314, counsel of record for petitioner, with sufficient first class postage affixed thereto.

This October.....1964.

J. WALTER LECRAW
Assistant Solicitor General
Atlanta Judicial Circuit